

**Urban Laboratories, Incorporated and Hotel and Restaurant Employees and Bartenders Union of San Diego, Local 30, AFL-CIO and Gerald Burke, Lemont Combs, Jr., and Carl J. Brown, Parties Charged with Derivative Liability; Urban Laboratories, Inc., and Gerald G. Burke, and Lemont Combs, Jr., and Carl J. Brown, Parties Charged with Derivative Liability and Carolyn Ramseur and National Maritime Union of America, AFL-CIO, ITPE Division and Jacqueline C. Williams and Esperanza Rodriguez.** Cases 19-CA-20948, 19-CA-20949, 19-CA-20950, 19-CA-20951, 19-CA-20952, and 19-CA-20953

December 31, 1991

### DECISION AND ORDER GRANTING REQUEST

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY, OVIATT, AND RAUDABAUGH

On July 31, 1989, the National Labor Relations Board issued a Supplemental Decision and Order Remanding in the above-entitled proceeding.<sup>1</sup> The Board denied the General Counsel's motion to partially strike the Respondents' answers to backpay specifications and motion for partial summary judgment and remanded the proceeding to the Regional Director for the purpose of scheduling a hearing before an administrative law judge, which hearing was to be limited to taking evidence concerning the amounts due the discriminatees and the issue of the derivative liability of Respondents Burke, Combs, and Brown.

On April 24, 1991, a hearing opened before Administrative Law Judge James M. Kennedy. After the hearing opened counsel for the General Counsel and Respondent Lemont Combs Jr. entered into a partial settlement agreement which was submitted to Judge Kennedy for approval. The settlement proposal was limited to one of the potential jointly and severally liable Respondents and provided for payment of \$10,000 to be apportioned among the discriminatees. The settlement provided that the payment constituted Combs' entire liability but further provided that the potential liability of the other Respondents was unaffected.

On September 18, 1991, Judge Kennedy issued an Order to Show Cause, advising that he was withholding approval of the settlement "until I resolve the issue of whether or not approval of that agreement might have the unintended effect of extinguishing any further claims against Respondents Burke and Brown." The judge's order sets forth "a general rule that a settlement by one of the joint and several tortfeasors, even though it may be a compromise, extinguishes the claim for the remainder due insofar as the others are

concerned, even if a settlement agreement provides otherwise."<sup>2</sup> Acknowledging his uncertainty whether this "rule" applied to Board proceedings, Judge Kennedy ordered the General Counsel and Respondent Combs to show cause why the proposed settlement should not be disapproved. The General Counsel and Respondent Burke filed responses to the judge's order.<sup>3</sup> On November 1, 1991, Judge Kennedy, reiterating the concerns expressed in his order to show cause, issued an Order Denying Approval of the Settlement Agreement.

On November 8, 1991, the General Counsel filed a request for special permission to appeal and an appeal from administrative law judge's failure to approve settlement agreement. The General Counsel argues that: (1) although the partial settlement involves only one of the alleged jointly and severally liable Respondents, it was negotiated with all parties present; (2) the common law rule relied on by Judge Kennedy is not established Board law and its application would not effectuate the purposes of the Act; (3) the rule applied by the judge is not applicable in all States and has been modified by both statutes and courts in a significant number of jurisdictions; and (4) to follow the rule applied by the judge "would create a patchwork pattern in this area and a totally chaotic situation." Therefore, the General Counsel urges the Board to grant the appeal, reverse the judge's order, and direct him to approve the settlement agreement.

Having duly considered the matter, the Board has decided to grant the General Counsel's appeal and, on appeal, vacate the judge's order. It is not unusual, in situations where the General Counsel is alleging joint and several liability, for one respondent to settle while litigation proceeds with respect to another respondent who declines to settle.<sup>4</sup> Further, although there is an absence of Board precedent treating the issue which prompted the judge to refuse to approve the settlement at issue, the Supreme Court has expressly repudiated the old common law rule in a case involving a statutory cause of action created under Federal law (antitrust). Rather, the Court adopted in that case the more modern rule that a release of one joint tortfeasor does not release the other joint tortfeasor unless that is the

<sup>2</sup> Judge Kennedy's order relies on Am. Jr. 2d, "Release and Discharge," Sec. 35; "Judgments" Sec. 989; and 69 ALR2d 1034. See also Washington State decisions, *Pinkham Lumber Co. v. Woodland State Bank*, 156 Wash. 117, 123, 286 Pac. 95, 98 (1930) and *Elliot v. Burns*, 645 P.2d 1136 (Wash.App. 1982).

<sup>3</sup> The General Counsel contended, inter alia, that the Board is "not bound by state court decisions regarding technical interpretation of settlements" and, in any event, does not follow the technical requirements of contract law. Respondent Burke contended, inter alia, that in the absence of Board precedent, the Board should apply state law and release the joint tortfeasors regardless of any expressed reservation of rights.

<sup>4</sup> See generally CHM 10130.3, which discusses settlement procedures in joint and several liability cases.

<sup>1</sup> 295 NLRB 1120 (1989).

intention of the parties. See *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 342–348 (1970). We note that this modern rule has also been adopted by the Second Restatement of Torts (see Restatement (Second) of Torts Sec. 85 (1977)), and an increasing number of States (see 66 AM Jur. 2d *Release* Secs. 37 and 38). As the Board is administering and enforcing a Federal statute which establishes national labor policy, we find, in agreement with the General Counsel, that this rule should also be applied in Board proceedings.

Here, the partial settlement agreement involving Lemont Combs Jr. expressly provides that the potential liability of the other Respondents was unaffected.

Thus, applying the modern rule, we find that approval of the partial settlement with Combs will not extinguish the claims against the remaining Respondents. Accordingly,

IT IS ORDERED that the General Counsel's request for special permission to appeal the judge's ruling is granted and, on appeal, the administrative law judge's order is vacated and the judge is directed to approve the partial settlement agreement.

IT IS FURTHER ORDERED that the proceeding is remanded to Administrative Law Judge James M. Kennedy for further appropriate action consistent with the Board's Order.